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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1962

No. [redacted] 75

MADELINE C. SCHROEDER, APPELLANT,

vs.

CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MARCH 2, 1962

PROBABLE JURISDICTION NOTED APRIL 30, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 763

MADELINE C. SCHROEDER, APPELLANT,

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

MADELINE C. SCHROEDER, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent.

STATEMENT UNDER RULE 234

This is an appeal from an order made at Special Term, granting the defendant's motion for judgment on the pleadings, denying the plaintiff's cross-motion to dismiss the answer, directing the entry of judgment accordingly, and an appeal from such judgment thereon entered.

This is an action for an injunction, to enjoin the defendant, City of New York, from diverting the waters of the Neversink River. The action was commenced in the Supreme Court, Sullivan County, by the service of a summons and verified complaint on the defendant on or about January 12, 1960.

The verified answer was duly served on the plaintiff on or about March 2, 1960. An order was made at Special Term, March 11, 1960, without opposition, compelling a reply to the answer, said order being entered in the Sullivan County Clerk's office on March 16, 1960. A verified reply was duly served on or about March 21, 1960.

[fol. 2] The defendant moved at Special Term, Albany County, April 22, 1960, for judgment on the pleadings, and the defendant cross-moved for the same relief.

By decision of Special Term, Taylor, J., the motion was granted, and the cross-motion denied.

The order thereon, dated May 25, 1960, was entered in the office of the Clerk of Sullivan County, on May 27, 1960. The notice of appeal from said order, dated May 28, 1960, was filed in the Sullivan County Clerk's office on May 31, 1960, and duly served.

The judgment entered on said order was dated June 8, 1860, (sic) and entered in the Sullivan County Clerk's office on said day. The notice of appeal from said judgment is dated June 13, 1960, and was filed in the Sullivan County Clerk's office on June 14, 1960, and duly served.

The name of the original plaintiff is Madeline C. Schroeder and the name of the original defendant is The City of New York.

That there has been no change or substitution of attorneys or parties since the commencement of this action.

[fol. 3]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

MADELINE C. SCHROEDER, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

NOTICE OF APPEAL TO THE APPELLATE DIVISION—
June 13, 1960

Please Take Notice that the plaintiff, Madeline C. Schroeder, hereby appeals to the Appellate Division of the Supreme Court, Third Department, from the judgment in this action dismissing the complaint herein, dated and also entered in the office of the Clerk of Sullivan County on the 8th day of June, 1960, and from each and every part of said judgment.

Dated: June 13, 1960.

Krieger & Scheinman, Attorneys for Plaintiff, Office & P. O. Address, Woodbourne, New York.

To:

Sullivan County Clerk, Monticello, New York.

Charles H. Tenney, Esq., Corporation Counsel of the City of New York, Attorney for Defendant, 41 John Street, Kingston, New York.

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

JUDGMENT APPEALED FROM — June 8, 1960

A motion having been made by the defendant for judgment on the pleadings under Rule 112 of the Rules of Civil Practice and Civil Practice Act 476, dismissing the complaint herein, and a cross motion having been made by the plaintiff for judgment on the pleadings and for an order under Rule 109(6) of the Rules of Civil Practice striking out three defenses contained in the answer on the ground that they are insufficient in law and said motion and cross-motion having regularly come on to be heard before this Court on the 22nd day of April, 1960, and the said motion on behalf of the defendant for judgment on the pleadings having been granted and the said cross-motion on behalf of the plaintiff for judgment on the pleadings and for an order under Rule 109(6) of the Rules of Civil Practice striking out three defenses contained in the answer having been denied, and an order dismissing said complaint having been made and entered in the office of the Clerk of Sullivan County on May 27, 1960,

Now, on motion of Charles H. Tenney, Corporation Counsel of the City of New York, attorney for the defendant, it is

Adjudged, that the complaint herein be dismissed.

Dated, June 8th, 1960.

Millicent C. Flynn, Clerk.

[fol. 6]

At a Special Term, Part I, of the Supreme Court of the State of New York held in and for the County of Albany, at the Albany County Courthouse in the City of Albany, New York, on the 22nd day of April, 1960.

Present: Hon. Donald S. Taylor, Justice.

[Same title]

ORDER APPEALED FROM—May 25, 1960

A motion having been made by the defendant for judgment on the pleadings under Rule 112 of the Rules of Civil Practice and Civil Practice Act §476, dismissing the complaint herein, and a cross-motion having been made by the plaintiff for judgment on the pleadings and for an order under Rule 109(6) of the Rules of Civil Practice striking out three defenses contained in the answer on the ground that they are insufficient in law and said motion and cross-motion having regularly come on to be heard before this Court on the 22nd day of April, 1960;

Now, on reading and filing the notice of motion dated April 8, 1960, with proof of due service thereof, the notice of cross-motion, dated April 12, 1960, with proof of due service thereof, and upon reading the complaint and answer herein together with the exhibits annexed to said answer and submitted therewith, the order herein, dated March 11, 1960, directing the plaintiff to serve a reply and the reply herein, and the said motions having been sub-
[fol. 7] mitted by Charles H. Tenney, Corporation Counsel (Theodore R. Lee and William A. Kaercher of Counsel), for the defendant, and by Krieger & Scheinman, Esqs. (Louis B. Scheinman of Counsel) for the plaintiff, and due deliberation having been had thereon, and upon filing the opinion of the Court,

Now, on motion of Charles H. Tenney, Corporation Counsel of the City of New York, attorney for the defendant, it is

Ordered, that the motion on behalf of the defendant for judgment on the pleadings be and the same hereby is granted; and it is further

Ordered, that the complaint in this action be and the same hereby is dismissed; and it is further

Ordered, that the Clerk of the Court is hereby directed to enter judgment accordingly; and it is further

Ordered, that the cross-motion on behalf of the plaintiff be and the same hereby is denied.

Dated: May 25th, 1960.

Enter

Donald S. Taylor, J. S. C.

[fol. 8]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

NOTICE OF MOTION—April 8, 1960

Sirs:

Please Take Notice that on the complaint, answer together with the exhibits thereto annexed and incorporated therein by reference, order directing the plaintiff to serve a reply to the new matter contained in the defendant's answer and the reply in the above entitled action, the undersigned will move this Court, at a Special Term, Part I thereof, to be held in and for the County of Albany at the Albany County Courthouse in the City of Albany, New York, on the 22nd day of April, 1960, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can he (sic) heard, for an order pursuant to Civil Practice Act #476 and Rule 112 of the Rules of Civil Practice, giving judgment to the defendant on the pleadings and dismissing the complaint on the ground that the complaint fails to state facts sufficient to constitute a cause of action and on the further ground that the alleged cause of action [fol. 9] stated therein is barred by the Statute of Limita-

tions, and for such other, further and different relief as may be just and proper.

Dated: April 8, 1960.

Yours etc.,

Charles H. Tenney, Corporation Counsel of the City of New York, Attorney for Defendant.

To:

Krieger & Scheinman, Esqs., Attorneys for Plaintiff.

[fol. 10]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

NOTICE OF CROSS-MOTION—April 12, 1960

Sir:

Please Take Notice that upon the Notice of Motion herein dated April 8, 1960, and upon the pleadings herein, the undersigned will cross-move this Court at the return date, April 22, 1960, at 10 o'clock in the forenoon of said day, upon the hearing of the motion herein at the County Court House in the City of Albany, New York, for an order pursuant to Section 476 of the Civil Practice Act, Rule 109, Subdivision 6, with respect to the first, second and third separate defenses, on the grounds that the same consist of new matter and are insufficient in law, and pursuant to Section 476 of the Civil Practice Act and Rule 112 of the Rules of Civil Practice, to dismiss the answer herein upon the grounds that the same is insufficient in law, and for such other and further relief as may be just and proper.

Dated: Woodbourne, New York, April 12, 1960.

Krieger & Scheinman, Attorneys for Plaintiff.

To:

Charles H. Tenney, Esq., Corporation Counsel of the City of New York.

[fol. 11]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

COMPLAINT

Plaintiff, by her attorneys Krieger & Scheinman, complains of the defendant and respectfully alleges:

1. That the plaintiff, at all times hereinafter mentioned, was the owner, and still is the owner, of certain premises located in the Town of Deerpark, Orange County, New York, more particularly described in a deed from Gustav Seise, Jr. to Plaintiff dated March, 1950 and recorded in the Orange County Clerk's office on the 19th day of April, 1950, in liber 1154 of deeds, at page 506.

2. That the defendant is a municipal corporation of the State of New York.

3. That the lands described in the above-mentioned deed consist of 3.5 acres of land, more or less, including land under and along the Neversink River, the southerly boundary of the said premises being along the center line of the said Neversink River the length of 175 feet, more or less.

4. That on the premises abovementioned was and is located a dwelling, with the usual appurtenances.

5. That from the date of the acquisition of said property above described, plaintiff has been and still is owner in fee simple thereof.

[fol. 12] 6. That heretofore and prior to March 14, 1952, the defendant City of New York instituted a proceeding to acquire the right to divert the waters of the Neversink River at the site of the Neversink Dam located at Neversink, Sullivan County, New York, which site is approximately twenty-five miles upstream from the above described premises of the plaintiff.

7. That pursuant to such proceeding an order was made by Special Term of the Supreme Court of the State of New York granting such right to the defendant.

8. That the said proceeding brought by the City of New York was had under Title K41 of the Administrative Code of the City of New York.

9. That in the said proceeding, maps were filed by the defendant in the Orange County Clerk's Office designated the river frontage of the plaintiff thereon as Parcel 424, Neversink Riparian Section #4.

10. That the order of Special Term aforesaid dated March 14, 1952 appointed Commissioners of Appraisal, which commissioners filed their oaths of office on June 9, 1952, the said date, under the aforesaid statute, being the date of the purported taking of the right to divert the river as aforesaid.

11. That the aforesaid premises of the plaintiff were, at all times herein mentioned, occupied by the plaintiff and her family during the summer months of July and August; that during the remainder of the year the plaintiff resides at 30 Seneca Ave., Dumont, New Jersey.

[fol. 13] 12. That under the taking statute aforementioned, the defendant was required to give notice of such taking by publication only, said notice in the following manner: In the City Record of the City of New York, in two public newspapers published in the City of New York, in two public newspapers published in each county in which any real estate to be acquired is located, such publications to be published once in each week in each of said newspapers for six weeks immediately previous to the making of the aforesaid application; and further for the posting of hand bills in at least twenty conspicuous places in the vicinity of the real estate to be taken or affected.

13. That none of the notices so published by the City of New York made any mention of the plaintiff herein or of her property except that the notice stated only that application was being made to acquire the right to divert the waters of the Neversink River as aforesaid.

14. That the section of the river designated as Neversink Riparian Section #4, is approximately 4 miles in length

and a total of only 22 hand bills were posted along the entire lengths of said Section, said hand bills being posted on January 22, 1952.

15. That plaintiff did not during the times herein mentioned ever read or see any copy of this New York City Record, nor did she at any time customarily purchase any newspapers published in the City of New York or any published in Orange County, except on rare occasion, and plaintiff did not at any time observe any of the aforesaid hand bills posted anywheres.

[fol. 14] 16. That at no time prior to her retention of counsel in this case in September, 1959, did plaintiff learn or know that the City of New York had acquired any portion of her property and that she had a right to a claim against the City of New York for damages.

17. That the City of New York did commence to divert the waters of the Neversink River at the site of the Neversink Dam in Sullivan County, New York, on or about June 1, 1953.

18. That the diversion of the Neversink River by the City of New York has greatly and severely damaged the plaintiff and that if the said diversion continues, plaintiff will suffer further damages, and if the said diversion is in perpetuity the same has greatly decreased the market value of her aforesaid property by reason of the fact that the said diversion has destroyed the availability, suitability, and usefulness of the river to plaintiff for bathing, swimming, fishing and boating.

19. That the aforesaid proceeding taken by the City of New York under the statute of aforesaid was and is for the purpose of acquiring a water supply for the inhabitants of the City of New York, inuring to the plaintiff no benefit whatever.

20. That the plaintiff has never been, at any time, notified in any manner that the City of New York sought to acquire the right to divert the Neversink River; nor has she ever been served with any summons, nor been given any other personal notice of any kind whatsoever that the defendant sought to acquire her property.

[fol. 15] 21. That the notice given by the City of New York was by publication only, and plaintiff had no knowledge, either constructive, actual or implied, of such proceeding prior to her retention of counsel herein.

22. That the City of New York is presently diverting the waters of the Neversink River in utter and complete disregard of the rights of the plaintiff.

23. That the provisions of Title K41 of the Administrative Code of the City of New York providing for notice to property owners whose property is to be acquired under the said statute requires notice by publication only, and in such manner as would not reasonably be expected to give notice to all or nearly all persons whose property is being taken.

24. That in the said proceeding the defendant laid out five sections of the Neversink River from the site of the Neversink Dam to the confluence of the said river with the Delaware River into which the Neversink flows, numbering said sections 1 through 5 inclusive.

That the amount of numbered parcels on the city's maps, and the number of mapped parcels designated which failed to file claims prior to the expiration of the Statute of Limitation are as follows:

[fol. 16]

Section No.	*No. of Mapped Parcels*	*No. of Mapped Parcels Not Filing in Time*
1	85	13
2	83	23
3	76	43
4	96	78
5	82	67
	431	224

25. That the numbered parcels on the city's maps consisted only of the river frontage of the lots or tracts of land which extended down to the bank or into the bed of the river. That the numbered parcels shown on the map indicate only the river frontage of each such tract of land

or lot and do not describe the remainder of such tract or lot of land.

26. That in addition to such numbered parcels as described above there is a substantial number of parcels upland from the river which have as easements appurtenant, by deed grant or reservation, rights of way to cross riparian and numbered parcels and to use and enjoy the facilities of the Neversink River.

27. That such upland parcels, despite such rights of way and title to the river, were not separately mapped or numbered and consequently do not appear and are not included in the computation set forth in paragraph "24" above.

28. That in addition to the 224 claims which were not filed in time as set forth in paragraph "24" above, there is a [fol. 17] substantial number of aforedescribed right of way claims which likewise have not been filed in time and which claims are being resisted by the defendant with the defense of Statute of Limitations.

29. That consequently the actual operation of the notice provisions of the condemnation statute has shown the complete inadequacy of such notice provisions contained in said statute.

30. That consequently the notice provisions of the said condemnation statute fail to meet the federal and the state constitutional requirements concerning the taking of private property by due process of law.

31. That consequently the defendant has failed to acquire the right to divert the waters of the Neversink River.

32. That the plaintiff is entitled to an order of this court enjoining and restraining the defendant City of New York from continuing its aforesaid trespass upon plaintiff's property and diverting the waters of the Neversink River.

33. That unless the defendant City of New York is so restrained and enjoined, plaintiff will suffer irreparable damages by reason thereof, having no other adequate remedy at law.

Wherefore, plaintiff demands judgment against the defendant enjoining the defendant from diverting the waters of the Neversink River, and for judgment against the defendant for the costs and disbursements of this action.

Krieger & Scheinman, Attorneys for Plaintiff.

(Verified by Louis B. Scheinman, January 5, 1960.)

[fol. 18]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

ANSWER

The defendant The City of New York, answering the complaint herein:

I. Admits the allegations contained in paragraph "1" of the complaint, except that the defendant denies any knowledge or information sufficient to form a belief as to whether the plaintiff was at all times mentioned in the complaint the owner of the premises referred to therein and is still the owner of said premises.

II. Admits the allegations contained in paragraph "5" of the complaint, except that the defendant denies knowledge or information sufficient to form a belief as to whether the plaintiff has been the owner of said property since the date of acquisition thereof and is still the owner thereof.

III. Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "11", "15" and "16" of the complaint.

IV. Denies the allegations contained in paragraph "12" of the complaint, except the defendant admits that Title K41 of the Administrative Code of the City of New York provides that notice of application for appointment of Commissioners of Appraisal shall be published in the City Record and in two public newspapers published in the City of New York and in two public newspapers pub-
[fol. 19] lished in each county in which any real estate laid out on the taking maps may be located; that such

notice shall be published once in each week in each of such newspapers for six weeks immediately prior to the presentation of the petition; and in addition that hand bills be posted for the same space of time in at least twenty conspicuous places in the vicinity of the real estate to be taken or affected.

V. Denies the allegations contained in paragraph "13" of the complaint, except the defendant admits that the notice for the appointment of Commissioners of Appraisal did not mention the plaintiff's name and that said notice stated that an application would be made to acquire the right to divert water from the Neversink River.

VI. Denies on information and belief the allegations contained in paragraph "18" of the complaint.

VII. Denies the allegations contained in paragraph "19" of the complaint, except the defendant admits that the primary purpose of said proceeding was for the purpose of acquiring a water supply for the City of New York.

VIII. Denies the allegations contained in paragraph "20" of the complaint, except the defendant admits that it did not serve the plaintiff personally with a summons or a notice that the defendant sought to acquire an interest in the plaintiff's property.

IX. Denies the allegations contained in paragraphs "21", "22", "23", "25", "29", "30", "31", "32" and "33" of the complaint.

[fol. 20] X. Denies the allegations contained in paragraph "27" of the complaint, except the defendant admits that said upland properties were not included in the computation set forth in paragraph "24" of the complaint.

As a First Separate and Complete Defense to the Complaint the Defendant Alleges on Information and Belief:

XI. On July 27, 1927, the Board of Water Supply reported to the Board of Estimate and Apportionment recommending a plan for the development of an additional supply of water from tributaries of the Delaware River, including the Neversink River.

XII. A general map of the sources of such additional supply, dated June 21, 1927 accompanied said report.

XIII. A notice dated November 18, 1927, of a hearing before the Board of Estimate and Apportionment on December 15, 1927, regarding the map, plan and profile dated June 21, 1927, was published as prescribed by statute.

XIV. Notice of such hearing was also mailed to the Chairman and Clerks of the Boards of Supervisors of the counties where the real estate to be acquired was situated. Such notice, dated November 18, 1927, was served by mail on the Chairman and Clerk of the Board of Supervisors of Orange County on or about November 23, 1927.

XV. After such public hearing, by resolution dated January 12, 1928, the Board of Estimate and Apportion- [fol. 21] ment approved and adopted said map dated June 21, 1927 as the "final map" of the Delaware project.

XVI. Thereafter said final map was executed in quadruplicate, certified and filed as required by law. One of such maps was filed in the Orange County Clerk's office on or about January 19, 1928.

XVII. A notice dated January 24, 1928, of a hearing before the Water Power and Control Commission regarding said map, plan and profile dated June 21, 1927 was published as prescribed by statute.

XVIII. After the public hearing held pursuant to said notice, by decision dated May 25, 1929, the Water Power and Control Commission approved said map, plan and profile dated June 21, 1927.

XIX. A notice dated October 14, 1938, of a hearing before the Board of Estimate on November 3, 1938, concerning a plan to modify the map and profile dated June 21, 1927 in accordance with a map and profile dated July 21, 1938, was published as prescribed by statute.

XX. Notice of such hearing on November 3, 1938 was also mailed to the Chairmen and Clerks of the Boards of Supervisors of the Counties where the real estate to be acquired was situated. Such notice, dated October 14, 1938, was served by mail on the Chairman and Clerk of the

Board of Supervisors of Orange County on or about October 28, 1938.

[fol. 22] XXI. After such public hearing, by resolution dated November 3, 1938, the Board of Estimate approved and adopted a certain map entitled:

> "City of New York—Board of Water Supply—Modification of Map and Profile of June 21, 1927 Showing Sources of, and Manner of Obtaining an Additional Supply of Water for the City of New York. July 21, 1938."

XXII. Said map dated July 21, 1938 was executed, certified and filed as required by law.

XXIII. One of said maps dated July 21, 1938 was filed in the office of the Clerk of Orange County on or about November 15, 1938.

XXIV. A notice dated January 3, 1939, of a hearing before the Water Power and Control Commission regarding said modification map dated July 21, 1938, was published as prescribed by statute.

XXV. After public hearing held pursuant to said notice, on or about February 20, 1939, the Water Power and Control Commission approved said modification map dated July 21, 1938.

XXVI. Thereafter the Board of Water Supply prepared six similar maps entitled:

> "Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, Map of Real Estate Situated along the Neversink River from the Vicinity of Cuddebackville to the Vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York."

[fol. 23] XXVII. The said six similar maps, known as taking maps, were approved and adopted by the Board of Estimate and filed as required by law. A duplicate original thereof was filed in the Orange County Clerk's office on December 5, 1951.

XXVIII. A reduced scale copy of the taking map for Neversink Riparian Section No. 4 is submitted herewith, marked "Exhibit A", and made a part hereof.

XXIX. The index sheet of the taking map for Neversink Riparian Section No. 4 lists the plaintiff Madeline Schroeder as the claimant or owner of parcel No. 424.

XXX. Sheet No. 10 of the taking map for Neversink Riparian Section No. 4 shows the location of parcel No. 424.

XXXI. The property designated as Parcel No. 424 in the Neversink Section No. 4 proceeding is the same property referred to in paragraph "1" of the complaint.

XXXII. The Corporation Counsel of the City of New York, by notice dated January 10, 1952, gave notice in the City Record, and in two public newspapers published in the City of New York, and in two public newspapers published in Orange County, of his intention to make application to the Supreme Court for the appointment of Commissioners of Appraisal.

XXXIII. A copy of the notice for the appointment of Commissioners of Appraisal, dated January 10, 1952, is attached hereto, marked "Exhibit B" and made a part hereof.

[fol. 24] XXXIV. Such notice of the application for the appointment of Commissioners of Appraisal was published, once in each week, in each of such newspapers, for at least six weeks immediately previous to the return date specified in the notice at which time the petition was presented to the Supreme Court.

XXXV. The notice of application for the appointment of Commissioners of Appraisal for Neversink Riparian Section No. 4 was also posted for the same space of time in at least twenty conspicuous places in the vicinity of the real estate to be taken or affected.

XXXVI. Proof of the publication and the posting of the notice of application for the appointment of Commissioners of Appraisal was filed in the Orange County Clerk's office on May 29, 1952.

XXXVII. A copy of the affidavit of posting, of Alfred J. May, sworn to March 11, 1952, is attached hereto, marked "Exhibit C" and made a part hereof.

XXXVIII. The notice of application for the appointment of Commissioners of Appraisal for Neversink Riparian Section No. 4, was as prescribed by statute.

XXXIX. The publication of said notice for the appointment of Commissioners of Appraisal for Neversink Riparian Section No. 4, was as prescribed by statute.

XL. The posting of said notice for the appointment of Commissioners was as prescribed by statute.

[fol. 25] XLI. The petition in Neversink Riparian Section No. 4 which was presented to the Court upon the application for the appointment of Commissioners of Appraisal was signed and verified by Irving V. A. Huie, then President of the Board of Water Supply on February 15, 1952. The petition set forth the action theretofore taken by the Board of Water Supply and the Board of Estimate, the filing of the taking maps and prayed for the appointment of Commissioners of Appraisal. It contained a general description of the real estate in which an interest, right or easement was sought to be acquired and referred to the parcel numbers as given on the taking maps and it recited that the petitioner sought the right and easement in perpetuity to divert certain waters from and release certain waters into the Neversink River.

XLII. A copy of the petition for Neversink Riparian Section No. 4 is attached hereto, marked "Exhibit D" and made a part hereof.

XLIII. The petition for Neversink Riparian Section No. 4 was as prescribed by statute.

XLIV. The order appointing Commissioners of Appraisal for Neversink Riparian Section No. 4 dated March 14, 1952, was entered in the Orange County Clerk's office on May 29, 1952.

XLV. A copy of the order appointing Commissioners of Appraisal for Neversink Riparian Section No. 4 is attached hereto, marked "Exhibit E" and made a part hereof.

XLVI. The Commissioners of Appraisal subscribed to their oaths of office on June 2, 1952 and their oaths were filed in the Orange County Clerk's office on June 6, 1952, [fol. 26] and in the New York County Clerk's office on June 9, 1952. By order dated June 1, 1953, the term of the Commissioners of Appraisal was extended for a period of eight months from June 9, 1953, to February 8, 1954.

XLVII. Upon the completion of the filing of the oaths of office of the Commissioners of Appraisal on June 9, 1952, the City of New York by virtue of §K41-11.0 of the Administrative Code of the City of New York, became vested with the diversion rights mentioned in the petition and order in all of the property described in the petition and shown on said map, including Parcel No. 424.

XLVIII. Actual diversion commenced on or about June 1, 1953.

XLIX. By an order dated May 19, 1954, entered in the Orange County Clerk's office on May 24, 1954, a successor commission was appointed for Neversink Riparian Section No. 4. The successor Commissioners took their oaths on June 9, 1954. Their oaths were filed in the Orange County Clerk's office on June 10, 1954 and in the New York County Clerk's office on June 14, 1954. By an order dated May 24, 1955, the term of the successor commission was extended for a period of eight months from June 14, 1955 to February 13, 1956.

L. By an order dated March 28, 1956, and entered in the Orange County Clerk's office on April 3, 1956, Neversink Riparian Sections 3, 4 and 5 were consolidated and successor Commissioners of Appraisal were appointed. By an order dated June 4, 1956 and entered in the Orange [fol. 27] County Clerk's office on June 6, 1956 a Commissioner of Appraisal was appointed to act in place and instead of one of the Commissioners of Appraisal appointed by said order dated March 28, 1956. The oaths of the Commissioners of Appraisal designated by said orders dated March 28, 1956 and June 4, 1956, were taken on June 14, 1956, filed in the Orange County Clerk's office on June 15, 1956 and certified copies thereof filed in the Sullivan

County Clerk's office and in the New York County Clerk's office on June 15, 1956 and June 18, 1956 respectively. By an order dated October 7, 1957 the term of said successor Commissioners was extended for a period of eight months from June 19, 1957 to February 18, 1958. By an order dated February 14, 1958 and entered in the Orange County Clerk's office on September 5, 1958, the term of said successor Commissioners was further extended for a period of six months from August 8, 1958. Thereafter a motion was made on behalf of certain claimants to further extend the term of said successor Commissioners but as yet no decision has been rendered on such motion.

LI. More than seven (7) years have elapsed since the filing of the oaths of the Commissioners of Appraisal for Neversink Riparian Section No. 4.

LII. More than six (6) years have elapsed since the actual diversion of water from the Neversink River by the defendant City of New York.

LIII. No claim on behalf of plaintiff Madeline C. Schroeder for the taking of the right to divert nor for the diver- [fol. 28] sion of water from the Neversink River has as yet been exhibited or presented to Commissioners of Appraisal.

LIV. No claim on behalf of the plaintiff Madeline C. Schroeder for the taking of the right to divert nor for the diversion of water from the Neversink River has as yet been presented to the defendant City of New York or any of its officers or employees except the summons and complaint in this action was served on the Law Department of the City of New York on or about January 12, 1960.

LV. Section K41-18.0(a) of the Administrative Code of the City of New York provides, in effect, that claims for damages due to the acquisition of a fee or an easement must be presented within three years after the vesting of title. Section K41-11.0 provides that title vests upon the filing of the oaths of office of the Commissioners of Appraisal.

LVI. This action and any claim of plaintiff Madeline C. Schroeder with respect to the matters alleged in the com-

plaint are barred by the Statute of Limitations contained in Section K41-18.0 of the Administrative Code of the City of New York.

As a Second Separate and Complete Defense to the Complaint the Defendant:

LVII. Repeats, reiterates and realleges paragraphs XI to LVI of this answer.

LVIII. Alleges on information and belief that this action is barred because of the failure of the plaintiff to allege in the complaint that at least thirty days have elapsed [fol. 29] since the demand, claim or claims, upon which the action was founded were presented to the Comptroller of the City of New York for adjustment, that a notice of intention to commence such action was filed with the Comptroller of the City of New York within six months after such action accrued or that the action was commenced within one year after the action accrued as provided in Section 394-a-1.0 of the Administrative Code of the City of New York and Section 50-e of the General Municipal Law.

As a Third Separate and Complete Defense to the Complaint the Defendant:

LIX. Repeats, reiterates and realleges paragraphs XI to LVIII inclusive of this answer.

LX. Alleges on information and belief that this action is barred by the laches of the plaintiff in failing to present a timely claim to Commissioners of Appraisal, in failing to serve a timely claim upon the defendant City of New York, in failing to present a claim or demand to the Comptroller of the City of New York before the commencement of this action and in delaying the commencement of this action.

Wherefore, the defendant demands judgment that the complaint be dismissed with the costs and disbursements of this action.

Charles H. Tenney, Corporation Counsel of the City of New York.

(Verified by Theodore R. Lee, March 1, 1960.)

[fol. 30]

EXHIBIT B, TO ANSWER

Notice of Motion

NEW YORK SUPREME COURT

NINTH JUDICIAL DISTRICT

IN THE MATTER

of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. McGAHEN and EDWARD C. MAGUIRE, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the County of Orange for the purpose of providing an additional supply of pure and wholesome water for the use of City of New York.

NEVERSINK RIPARIAN SECTION NO. 4

PLEASE TAKE NOTICE that it is the intention of the Corporation Counsel of the City of New York, pursuant to the provisions of Title K of the Administrative Code of the City of New York, to make application to the Supreme Court of the State of New York at a Special Term thereof to be held at the Dutchess County Court House, in the City of Poughkeepsie, County of Dutchess, New York, in the Ninth Judicial District, on the 14th day of March, 1952, at the opening of Court on that day, or as soon thereafter as counsel can be heard thereon, for the appointment of [fol. 31] three Commissioners of Appraisal to ascertain and determine the compensation to be made to the owners and all persons interested in certain real estate affected for the purposes indicated in said Title K of the Administrative Code of the City of New York as shown upon a certain map entitled:

"Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, map of Real Estate Situated along the Neversink River from the vicinity of Cuddebackville to the vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York",

adopted by the Board of Estimate November 15, 1951, and filed in the office of the County Clerk of Orange County on December 5, 1951; as Parcels Nos. 219 through 306 and 423 through 430, both inclusive.

The petitioner by this proceeding seeks to become vested with the right and easement in perpetuity in and against all of the parcels of real estate above described and shown on the aforesaid map to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the Neversink Dam described in the petition herein, either continuously or from time to time, and in such quantities as the operating needs of the City of New York as determined by it, may require together with the right from time to time to release and discharge into the [fol. 32] Neversink River below the Neversink Dam waters impounded in the Neversink Reservoir.

Dated: January 10, 1952.

DENIS M. HURLEY
Corporation Counsel
Office and Post Office Address
Municipal Building
Chambers and Center Streets
Borough of Manhattan
New York, New York

[fol. 33]

EXHIBIT C, TO ANSWER

Affidavit of Alfred J. May

NEW YORK SUPREME COURT

NINTH JUDICIAL DISTRICT

IN THE MATTER

of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. McGAHEN and EDWARD C. MAGUIRE, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the County of Orange for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

NEVERSINK RIPARIAN SECTION NO. 4
ORANGE COUNTY

State of New York,
County of Ulster, ss.:

ALFRED J. MAY, being duly sworn, deposes and says:

That he is Managing Clerk of the Kingston Office of the Law Department of the City of New York, and is over the age of twenty-one.

That on the 22nd day of January, 1952, he posted copies of the Notice of Application for the Appointment of Commissioners of Appraisal herein in hand bills in twenty-two [fol. 34] conspicuous places in the vicinity of the real estate to be taken or affected by this proceeding as follows, viz:

Town of Deerpark, Orange County

1. Easterly side of Neversink River, 2400' easterly from Route 209 on tree (on parcel 253) on westerly side of road to Bloomingburg near bridge over Basher Kill.

2. Easterly side of Neversink River, on a tree at southerly side of intersection Route 209 and road to Bloomingburg, near highway bridge.

3. Easterly side of Neversink River, 100′ westerly from Route 209, on tree on easterly side of lane along Neversink River, near highway bridge.

4. Easterly side of Neversink River, 1200′ westerly from Route 209, on tree on westerly side of lane along Neversink River, near highway bridge.

5. Westerly side of Neversink River, on a tree at westerly corner of intersection of Old Route 209 and road along westerly side of Neversink River near highway bridge.

6. Westerly side of Neversink River, on a pole at the corner of southerly side of Route 209 and road to railroad station.

7. Easterly side of Neversink River, on tree at westerly side of road 100′ downstream from first highway bridge below confluence of Neversink River and Basher Kill.

[fol. 35] 8. Westerly side of Neversink River, on tree at southerly side of road 100′ west of first highway bridge below confluence of Neversink River and Basher Kill.

9. Westerly side of Neversink River, on pole at northeast corner of intersection of road to Myers Grove and the road from Godeffroy.

10. On westerly side of Neversink River, on tree at northeasterly side of intersection in Myers Grove.

11. On westerly side of Neversink River, on tree at easterly side of Route 209, southerly 500′± from intersection with road to Myers Grove in Godeffroy.

12. On westerly side of Neversink River on tree at easterly side of Route 209, about one mile southerly from Godeffroy.

13. On westerly side of Neversink River, on tree at easterly side of Route 209, about 1¾ mile southerly from Godeffroy.

14. On westerly side of Neversink River, on pole on side road on easterly side of Route 209, opposite main intersection in Huguenot.

15. On westerly side of Neversink River, on tree on southeasterly corner of intersection of Route 209 (about 0.6 mile southerly from Huguenot) and road to highway bridge across Neversink River in parcel 275.

16. On easterly side of Neversink River, on tree at easterly side of road just below highway bridge in vicinity of riparian parcel 275.

[fol. 36] 17. On easterly side of Neversink River, on tree at easterly side of road near house on riparian parcel 299.

18. On westerly side of Neversink River, on tree at easterly side of Route 209 in the vicinity of entrance to parcel 306.

19. On westerly side of Neversink River, on tree at easterly side of Route 209, in the vicinity of parcel 300.

20. On westerly side of Neversink River, on tree at easterly side of Route 209 in front of State Police Barracks.

21. On westerly side of Neversink River, on tree at easterly side of Route 209 in the vicinity of parcel 281.

22. On westerly side of Neversink River, on tree at easterly side of Route 209 at entrance road to parcel 274 (Van Inwegen).

That the aforesaid hand bills were posted by your deponent in at least twenty-two conspicuous places in the vicinity of the real estate to be taken or affected on January 22, 1952, and which posting was six weeks immediately previous to the presentation of such petition.

Deponent further says that said hand bills were entitled as follows, and that a specimen thereof is hereto attached:

"Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, map of real estate situated along the Neversink River from the vicinity of

[fol. 37] Cuddebackville to the vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York."

ALFRED J. MAY

Sworn to before me this
11 day of March, 1952.
WILLA MAE EDWARDS, Notary Public

(Note: This notice was printed on durable cloth approximately 28 inches by 18 inches.)

[fol. 38]

EXHIBIT D, TO ANSWER

Petition

NEW YORK SUPREME COURT
NINTH JUDICIAL DISTRICT

IN THE MATTER
of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. McGAHEN and EDWARD C. MAGUIRE, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the County of Orange for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

NEVERSINK RIPARIAN SECTION No. 4
ORANGE COUNTY

TO THE SUPREME COURT OF THE STATE OF NEW YORK:
NINTH JUDICIAL DISTRICT

The petition of the Board of Water Supply of the City of New York respectfully shows to the Court, and alleges upon information and belief, for and on behalf of said City:

I.

That Irving V. A. Huie, Rufus E. McGahen and Edward C. Maguire are duly appointed commissioners constituting [fol. 39] the Board of Water Supply of the City of New York, and that said Irving V. A. Huie is President of said Board, and duly authorized by said Board to sign and verify this petition which is made pursuant to the provisions of Title K of Chapter 41 of the Administrative Code of the City of New York (Laws 1937, Chapter 929, as amended).

II.

That the Board of Water Supply on the 27th day of July, 1927, reported to the Board of Estimate and Apportionment of the City of New York, recommending a plan for the development of an additional supply of pure and wholesome water from tributaries of the Delaware River and for the construction of an aqueduct tunnel for the delivery of said additional water to Hill View Reservoir.

Accompanying said report was a map and profile dated June 21, 1927, entitled:

> "Board of Water Supply of the City of New York, Map and Profile Showing Sources of, and manner of Obtaining, an Additional Supply of Water for the City of New York",

which is a general map or plan of the sources of additional supply and of the aqueduct tunnel to be constructed for the delivery of said additional supply of water to the Hill View Reservoir and includes thereon the real estate hereinafter described.

[fol. 40] III.

That the Board of Estimate and Apportionment, after a public hearing thereon, held after due and reasonable public notice thereof affording all persons interested a reasonable opportunity to be heard, thereafter, and on the 12th day of January, 1928, by resolution, duly approved and adopted the aforesaid final map or plan and directed that the same

be executed, certified in quadruplicate and filed as required by law, and that a petition be made to the State Water Power and Control Commission for the approval of said final map or plan. That said final map or plan is known and commonly referred to as the "Delaware Project" and it included, among other things, a plan to divert the waters of the Delaware River and certain tributaries thereof.

IV.

That thereafter said final map or plan was executed and certified in quadruplicate and said map or plan and certified copies thereof filed as required by law.

V.

That thereafter, the State Water Power and Control Commission, on the 25th day of May, 1929, by order and decision duly made, signed and filed, upon an application duly made by the City therefor, duly approved said map or plan.

[fol. 41]

VI.

That thereafter the Supreme Court of the United States, on or about the 25th day of May, 1931, in an action brought by the State of New Jersey against the State of New York and the City of New York, to which the State of Pennsylvania became a party by intervention, duly made and entered a decree authorizing the City of New York to divert from the Delaware River or its tributaries to the New York City Water Supply the equivalent of 440 million gallons of water daily, subject to the conditions in said decree set forth, and enjoining any diversion by the City in excess of that amount.

VII.

That the Board of Water Supply, on the 8th day of September, 1938, presented to the Board of Estimate of the City of New York, a report recommending a modification of the aforesaid final map or plan hereinbefore described, accompanied by a map and profile dated July 21, 1938, entitled:

"City of New York, Board of Water Supply Modification of Map and Profile of June 21, 1927, Showing Sources of and Manner of Obtaining, an Additional Supply of Water for the City of New York".

That the Board of Estimate, on the 3rd day of November, 1938, after a public hearing thereon held pursuant to due and reasonable public notice thereof according to law, by resolution, duly approved and adopted the aforesaid mod- [fol. 42] ification and directed that the said modified map or plan be executed, certified and filed as required by law and that application for approval of said modification be made to the State Water Power and Control Commission. That thereafter the aforesaid modified map or plan was duly executed, certified and filed as required by law and upon application duly made therefor, the State Water Power and Control Commission, on February 20, 1939, by an order and decision duly made, signed and filed, duly approved the same. That the map or plan thus approved complies in all respects with the requirements of the aforesaid decree of the Supreme Court of the United States of May 25, 1931, in said action brought by the State of New Jersey against the State of New York and the City of New York, and said decision of the State Water Power and Control Commission requires that, execution of said plan and operations after such execution be in conformity with the provisions of said decree.

VIII.

That the aforesaid decision of the State Water Power and Control Commission approved the construction by the City of New York of a dam commonly referred to as Neversink Dam and a reservoir on the Neversink River commonly referred to as Neversink Reservoir. That the Neversink Dam, construction of which was approved as aforesaid, will be approximately 2800 feet in length; its top will be at an elevation of 1460 feet and its spillway at an elevation of 1440 feet above mean sea level at Sandy Hook, and con- [fol. 43] struction of said dam and its appurtenances will impound approximately thirty-seven billion gallons of water which is the estimated storage capacity of said Neversink Reservoir.

IX.

That the aforesaid Neversink Reservoir will be approximately 5 miles in length, with a maximum width of about 1.5 miles and an average width of about 1/2 and a shore line of approximately 18 miles, and a maximum depth of water in said reservoir when full of 180 feet; the average depth will be about 70 feet.

X.

That the Board of Water Supply is proceeding to construct the structures required and has proceeded to acquire the various lands and rights necessary for the Neversink Reservoir.

XI.

That the Board of Water Supply, in accordance with the provisions of Title K of the Administrative Code of the City of New York, after having caused a survey to be made, prepared six similar maps of real estate situated in the Town of Deerpark, County of Orange, State of New York, to be affected by the acts of the City of New York in the execution of the aforesaid final map or plan as adopted, modified and filed as aforesaid. Each of said maps is entitled:

[fol. 44] "Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, map of Real Estate Situated along the Neversink River from the vicinity of Cuddebackville to the vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York."

The Board of Water Supply and its Chief Engineer on the 30th day of October, 1951; duly approved and signed the aforesaid six similar maps and the Board of Estimate on November 15, 1951, duly adopted the same.

XII.

That the Corporation Counsel on the 5th day of December, 1951, filed one of the said six similar maps in the office of the Clerk of the County of Orange.

XIII.

That in accordance with the provisions of Title K of the Administrative Code of the City of New York, upon said map so filed as aforesaid, there was plainly indicated, laid out and numbered, the parcels of real estate to be affected by the acts of the City of New York in the execution of the aforesaid final map or plan as modified.

[fol. 45]

XIV.

That the Petitioner by this proceeding seeks to become vested with the right and easement in perpetuity in and against all the parcels of real estate herein described and shown on the aforesaid map filed herein, to divert all, or any part, of the waters of the Neversink River and its tributary watershed originating above the aforesaid Neversink Dam, either continuously or from time to time, and in such quantities as the operating needs of the City of New York as determined by it, may require; together with the right from time to time to release and discharge into the Neversink River below the Neversink Dam, waters impounded in the Neversink Reservoir.

XV.

In the exercise of the rights and easements to be acquired herein, Petitioner will at all times observe and adhere to each and every one of the provisions of the decree of the Supreme Court of the United States referred to in Paragraph VI herein, and to any subsequent modification thereof.

XVI.

That the rights in the real estate and to the waters of the Neversink River which are to be acquired in perpetuity by this proceeding are necessary for constructing, maintaining, and operating Neversink Reservoir and appur-
[fol. 46] tenances and for the execution of the aforesaid final map or plan as modified to furnish the inhabitants of the City of New York an additional supply of pure and wholesome water.

XVII.

A general description of the real estate to be affected for the purposes of this proceeding is as follows:

All those certain lots, pieces or parcels of real estate situated in the Town of Deerpark, in the County of Orange, State of New York, shown upon a certain map entitled:

"Board of Water Supply of the City of New York, map of real estate situated along the Neversink River from the vicinity of Cuddebackville to the vicinity of Huguenot in the Town of Deerpark, County of Orange, State of New York",

adopted by the Board of Estimate on the 15th day of November, 1951, and filed in the office of the Clerk of the County of Orange on the 5th day of December, 1951, as Parcel Nos. 219 through 306 and 423 through 430, both inclusive.

XVIII.

Petitioner further alleges that it has taken all the steps and discharged all the duties imposed upon it by law to entitle it to make this application and further states that no previous or other application has been made for the relief herein sought.

[fol. 47] WHEREFORE, the Petitioner, the Board of Water Supply of the City of New York, for and on behalf of the City of New York, and for the purpose of vesting in the City of New York the right and easement in perpetuity in and against all the parcels of real estate herein described and shown on the aforesaid map filed herein, to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the aforesaid Neversink Dam, either continuously or from time to time and in such quantities as the operating needs of the City of New York, as determined by it, may require; together with the right from time to time to release and discharge into the Neversink River below the Neversink Dam, waters im-

pounded in the Neversink Reservoir, prays this Honorable Court to make an Order in accordance with the provisions of Title K of the Administrative Code of the City of New York, appointing three disinterested and competent freeholders, at least one of whom shall reside in the City of New York, and at least one of whom shall reside in Orange County, as Commissioners of Appraisal with full power to ascertain and determine the compensation to be made by the Petitioner under the Federal and State Constitutions and the laws of the State of New York to the owners and all persons interested in the real estate described herein and shown on the map filed in the Orange County Clerk's Office as aforesaid, by reason of the acquisition of the aforesaid right in perpetuity and by reason of the execution of the aforesaid final map or plan as modified and [fol. 48] to ascertain and determine any and all legal damages payable by the Petitioner under the provisions of Title K of the Administrative Code of the City of New York.

And your Petitioner further prays that the Court shall in said Order fix the time and place of the first meeting of said commissioners and grant such other and further relief as may be just and proper.

Dated: New York, February 15th, 1952.

THE BOARD OF WATER SUPPLY

By: IRVING V. A. HUIE
Commissioner and President

Approved as to form:

DENIS M. HURLEY
Corporation Counsel

State of New York,
County of New York, ss.:

IRVING V. A. HUIE, being duly sworn, deposes and says: That he is a member and the President of the Board of Water Supply of the City of New York, the Petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true to the knowledge of deponent, except as to those

matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the sources of deponent's information and the grounds of his belief as to such matters are the records of the City of New York and its departments and officials in the pos- [fol. 49] session of said Board of Water Supply; and that this verification is made by deponent in pursuance of a resolution as required by law, of the said Board of Water Supply authorizing the verification of this petition to be made by deponent.

IRVING V. A. HUIE

Sworn to before me this
15th day of February, 1952.
RICHARD H. BURKE

(Notary Stamp affixed to original)

[fol. 50]

EXHIBIT E, TO ANSWER

Order Appointing Commission in Neversink Riparian Section No. 4, Orange County

At a Special Term of the Supreme Court of the State of New York, held in and for the Ninth Judicial District at the Dutchess County Courthouse, in the City of Poughkeepsie, New York, on the 14th day of March, 1952.

Present:

Hon. J. Gordon Flannery, Justice.

IN THE MATTER

of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. MCGAHEN and EDWARD C. MAGUIRE, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the Counties of Sullivan and Orange, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

On reading and filing the petition of the Board of Water Supply of the City of New York, verified by Irving V. A. Huie, Commissioner and President, on the 15th day of February, 1952, from which it appears that the acquisition [fol. 51] in perpetuity of the right and easement, in and against all the parcels of real estate described in said petition and shown on the map therein referred to, one of which was filed in the office of the Clerk of Sullivan County on the 5th day of December, 1951, which right and easement in perpetuity is to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the Neversink Dam, either continuously or from

time to time in such quantities as the operating needs of the City of New York, as determined by it, may require, together with the right from time to time to release and discharge into the Neversink River below the Neversink Dam, waters impounded in the Neversink Reservoir; and it further appearing that due and proper notice of this application has been given by the posting of handbills and publication as required by law; and on reading and filing such proofs of such posting and publication, and upon all the papers and proceedings duly taken and had herein from which it appears that all provisions of law have been complied with;

Now, after hearing Denis M. Hurley, Corporation Counsel of the City of New York, Robert E. Hugh, Esq., of Counsel, in support of said application and petition, and no one appearing in opposition thereto; and due deliberation having been had, it is

ORDERED, that William E. Doulin of 318 Montgomery St., Newburgh, Orange County, Nathan Sweedler, 194 Crown St., Brooklyn, N. Y. of New York City, and John L. Palisi, 5 Cliff Street, Beacon, Dutchess County, all three of whom [fol. 52] are disinterested and competent freeholders, be, and they hereby are appointed Commissioners of Appraisal to ascertain and determine the compensation to be made to the owners of and all persons interested in the real estate laid down on said map and described in said petition in and against the parcels in which the City of New York proposes to acquire the right and easement in perpetuity to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the Neversink Dam, either continuously or from time to time and in such quantities as the operating needs of the City of New York, as determined by it, may require, and the further right from time to time to release and discharge into the Neversink River below the Neversink Dam, waters impounded in the Neversink Reservoir; and to ascertain and determine the compensation to be made by the petitioners under the Federal and State Constitutions and the Laws of the State of New York, to the owners and all persons interested in the real estate described and

shown on the aforesaid map by reason of the acquisition of the aforesaid rights and easements in perpetuity and by reason of the execution of the aforesaid final map or plan as modified; and to exercise and discharge all the powers and duties conferred upon such Commissioners of Appraisal by Title K of the Administrative Code of the City of New York; and it is further

ORDERED, that the first meeting of said Commissioners of Appraisal shall be held in the City of Newburgh, New [fol. 53] York, on the 2nd day of June, 1952, in the Supreme Court Room, in the County Court House at 1:30 o'clock in the afternoon of that day, and it is further

ORDERED that the City of New York be and it is hereby directed to release and discharge waters into the Neversink River below the Neversink Dam in the amount of three million gallons daily, from November 1st to and including April 7th, and ten million gallons daily from April 8th to and including October 31st in each year.

Enter in Orange County.

J. GORDON FLANNERY
J. S. C.

[fol. 56]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

REPLY

Plaintiff, for her reply to the answer herein, pursuant to the order of this Court made herein, respectfully:

As to the First Affirmative Defense:

1. Denies the allegation of Paragraph "XXXI" of the Answer herein except that the plaintiff admits that said parcel No. 424 is a portion of the property referred to in Paragraph "1" of the complaint.

2. Denies the allegation of Paragraph "XXXV" of the Answer herein except that the plaintiff does admit that notice of application was posted for the same space of

time in at least 20 places in Neversink Riparian Section No. 4.

3. Denies the allegation of Paragraph "XL" except that the plaintiff does admit that said notices were posted in at least 20 places in Neversink Riparian Section No. 4.

4. Denies the allegations of paragraphs "XLVII" and "LVI" of the answer.

As to the Second Affirmative Defense:

5. Denies the allegations contained in Paragraph "LVIII" of the answer.

[fol. 57] As to the Third Affirmative Defense:

6. Denies the allegations of Paragraph "LX" of the answer.

Wherefore, plaintiff demands judgment dismissing the Answer herein with the costs and disbursements of this action.

Krieger & Scheinman, Attorneys for Plaintiff.

(Verified by Louis B. Scheinman, March 14, 1960.)

[fol. 58]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

OPINION—April 22, 1960

(Supreme Court, Albany County Special Term,

April 22, 1960)

(Justice Donald S. Taylor, Presiding)

Appearances:

Krieger & Scheinman, Esqs., Attorneys for plaintiff, Louis B. Scheinman, Esq., of Counsel.

Charles H. Tenney, Esq., Corporation Counsel, Attorney for defendant, Theodore R. Lee and William A. Kaercher, Esqs., of Counsel.

Memorandum

TAYLOR, J.:

This is an action instituted by a riparian owner whose premises extend about 175 feet to and along the center of the Neversink River permanently to enjoin the defendant from diverting its waters upstream from plaintiff's property for the purposes specified in Title K 41 of the Administrative Code of the City of N York.

The defendant moves for judgment on the pleadings. (Civ. Prac. Act, §476; Rules Civ. Prac., Rule 112.) The plaintiff cross-moves for similar relief and also to strike three defenses consisting of new matter on the ground that they are insufficient in law. (Rule 109, subd. 6, *supra*.) [fol. 59] The parties are agreed that the sole issue to be determined on the respective motions for judgment is whether the notice provisions of Section K 41-8.0 of the Water Supply Act—admittedly fully complied with by the defendant—upon which the diversional rights which the defendant exercises are to some extent founded are violative of the due process provisions of the Federal and State Constitutions (N. Y. Const., Art. I, §6; U. S. Const., Amendts. 5 and 14 §1.)

Mr. Justice MacAffer thoroughly considered, and, in my judgment, correctly determined the constitutional questions which are presented here. (*Matter of Huie* [*Bruckman*]; Sup. Ct., Sullivan Co., Feb. 17, 1956, see, also, *Matter of Huie* [*Richle*], Sup. Ct., Orange Co., June 17, 1959, Eager, J.; *Matter of Huie* [*Nielson*], 6 A. D. 2d 837.)

Accordingly, the motion is granted and the cross-motion is denied.

Submit order.

[fol. 66]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS FROM JUDGMENT—
August 16, 1961

SIR:

Please Take Notice that the plaintiff above named hereby applies to the Court of Appeals of the State of New York from the judgment in the above entitled action, entered in the office of the Clerk of the County of Sullivan on the 11th day of August, 1961, which was entered upon an order of the Appellate Division of the Supreme Court, Third Department, entered in the office of the Clerk of said Appellate Division on the 8th day of August, 1961, which said order unanimously affirmed the judgment of the Supreme Court in the above entitled action, entered in the office of the said Clerk of Sullivan County on or about the 8th day of June, 1960.

Please Take Further Notice that the plaintiff appeals from each and every part of said judgment of the said Ap-
[fol. 67] pellate Division of the Supreme Court and from the whole thereof.

Dated: August 16, 1961.

Yours, etc.

Krieger & Scheinman, Attorneys for Plaintiff-Appellant, Office & Post Office Address, Woodbourne, New York.

To: The Clerk of the County of Sullivan.

Leo A. Larkin, Corporation Counsel of the City of New York, attorney for the City of New York, 41 John Street, Kingston, New York.

[fol. 68]

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, in the County of Albany, at the County Court House in the City of Albany, on the 13th day of March, 1961.

Present:

Hon. Francis Bergan, Presiding Justice.
Hon. James Gibson, Hon. J. Clarence Herlihy, Hon. Walter B. Reynolds, Associate Justices.

Madeline C. Schroeder, Plaintiff-Appellant,

against

The City of New York, Defendant-Respondent.

(No. 2678)

Order of Affirmance—entered August 8, 1961

The above named plaintiff-appellant in this action, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department from an order of the Supreme Court made at Special Term, Albany County, entered in the office of the Clerk of Sullivan County [fol. 69] on May 27, 1960 granting respondent's motion for judgment on the pleadings, dismissing the complaint and denying appellant's cross-motion to dismiss the answer and from the judgment dismissing the complaint entered thereon in the office of the Clerk of Sullivan County on June 8, 1960 and the said appeal having been argued by Louis B. Scheinman, of counsel for appellant and by Theodore R. Lee of counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision of the court herein heretofore filed:

It Is Unanimously Ordered and Adjudged, that the order and judgment so appealed from be and the same hereby are affirmed, without costs. The opinion is referred to herewith.

Alfred J. Grodecki, Asst. Deputy Clerk.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 70]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

MADELINE C. SCHROEDER, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

JUDGMENT OF AFFIRMANCE—August 11, 1961

The above named plaintiff, Madeline C. Schroeder, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court made at Special Term, Albany County, entered in the office of the Clerk of Sullivan County on May 27, 1960, granting the defendant's motion for judgment on the pleadings, dismissing the complaint and denying the plaintiff's cross-motion to dismiss the answer and from the judgment dismissing the complaint entered thereon in the office of the Clerk of Sullivan County on June 8, 1960, and the said Appellate Division of the Supreme Court having rendered its decision unanimously affirming said judgment and order, without costs, and having ordered and adjudged that the judgment and order so appealed from be affirmed, without costs, and a certified copy of the order of said Appellate Division having been duly filed together with the record, in the office of the Clerk of Sullivan County,

[fol. 71] Now on motion of Leo A. Larkin, Corporation Counsel of the City of New York, attorney for the defendant, it is

Ordered, Adjudged and Decreed, that the judgment and order so appealed from be and the same hereby are in all things affirmed.

Judgment signed and entered this 11 day of August, 1961.

Millicent C. Flynn, Clerk.

[fol. 72]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

2678

MADELINE C. SCHROEDER, Appellant,

v.

THE CITY OF NEW YORK, Respondent.

DECISION OF APPELLATE DIVISION—August 1, 1961

Order and judgment affirmed, without costs.

Opinion by Reynolds, J.
Bergan, P. J., and Herlihy, J., concur.
Gibson, J., concurs in the result.

[fol. 73]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

MADELINE C. SCHROEDER, Plaintiff-Appellant,

vs.

THE CITY OF NEW YORK, Defendant-Respondent.

Argued, March Term, 1961.

Before:

Hon. Francis Bergan, Presiding Justice.

Hon. James Gibson, Hon. J. Clarence Herlihy, Hon. Walter B. Reynolds, Associate Justices.

Appeal from order and judgment entered thereon granting respondent's motion for judgment on the pleadings and denying appellant's cross-motion to dismiss the answer.

[fol. 74] Krieger & Scheinman, Attorneys for Plaintiff-Appellant, Woodbourne, N. Y.

Charles H. Tenney, Corporation Counsel, City of New York, Attorney for Defendant-Respondent, 41 John Street, Kingston, N. Y.

OPINION—August 1, 1961

REYNOLDS, J.:

Appellant, riparian owner of a parcel of land on the Neversink River in Orange County, brought suit to enjoin respondent from diverting said river upstream from appellant's property. Respondent in 1952 commenced a proceeding to acquire the right to divert the river. In accordance with the provisions of S K 41-8.0 of the Administrative Code of the City of New York, notice of the proposed diversion, properly listing the property affected was published each week for six weeks prior to the presentation of the petition in the city record, two public newspapers published in the City of New York and two public newspapers published in the county in which the appellant's property was situated. In addition handbills were posted in at least 20 conspicious places in the vicinity of the real estate affected. There is no requirement for written notice and none was sent. The statute bars claims not filed within 3 years from the filing of the oaths of the Commissioners of Appraisal (June 9, 1952) or within 3 years of the diversion (June 2, 1953). Appellant does not dispute that there has been compliance with the provisions of the Administrative Code but asserts that the notice requirements of [fol. 75] S K 41.8.0 are violative of Article 1, 6 of the New York Constitution and Amendments 5 and 14 1 of the United States Constitution claiming that constructive notice is constitutionally inadequate. Constructive notice has long been upheld by the courts of this state in proceedings

similar to the instant case (*Rexford* v. *Knight*, 11 N. Y. 308; *Benedict* v. *State of New York*, 120 N. Y. 228 (1890); *Matter of City of Rochester (In re McLean)*, 102 App. Div. 181 [4th Dept.]).

In the *City of Rochester* case at pp. 186-187:

> "As we have seen, personal notice was not served upon the owners of the premises, and we think such service was not necessary. The Legislature was competent to declare what notice would be sufficient. It has been held that a notice is sufficient if of a kind which it is reasonably probable would apprise the party proceeded against of the proceeding, and such as will give such party an opportunity to be heard. (*Matter of Union El. R. R. Co. of Brooklyn*, 112 N. Y. 61; *Matter of Mayor, etc., of City of New York*, 99 *id.* 570.)
>
> "We think that under those authorities the notice prescribed by the act in question employed with the requirements of the Constitution."

Appellant urges that the Supreme Court opinion in *Walker* v. *Hutchinson*, 352 U. S. 112 decided in 1956 is determinative of the issues here presented. However the pertinent provisions of the Kansas statute in *Walker* are a far cry from those publications requirements in EK 42-8.0. [fol. 76] The Kansas statute also provided for an alternate notice in writing which is absent in the New York statute involved herein. Under EK 41-8.0 appellant had 3 years from the filing of the oaths of the commissioners or from the diversion, whichever was later, in which to file her claim. In our opinion the publications, posting and the patently visible effect of the diversion proceedings on the Neversink over a 3-year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions. We do not feel compelled to declare unconstitutional a statute which was enacted in 1905 and which has been consistently upheld by the courts. (Cf. *Matter of Huie* [*Neilson*], 6 A. D. 2d 837; *Matter of Huie* [*Rollins*], 204 Misc. 945; *Matter of Huie* [*Buckman*], Supreme Court, Rensselaer County [MacAffer, J.], February 17, 1956.)

The order and judgment should be affirmed.

[fol. 76a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 77]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

MADELINE C. SCHROEDER, Appellant,

v.

CITY OF NEW YORK, Respondent.

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* * * * * * * * *

OPINION—Decided January 25, 1962

FULD, J. On this appeal, before us as of right on constitutional grounds, we are called upon to decided whether the notice provisions of the Water Supply Act (Administrative Code of City of New York, ch. 41, tit. K) contravene requirements of the Due Process Clause of the Federal Constitution (5th and 14th Amdts.; see also N. Y. Const., art. I, § 6).

The City of New York, the defendant herein, early in 1952 instituted a proceeding, pursuant to the Water Supply Act, to acquire the right to divert a portion of the Neversink River in Orange County; in June, the city became vested with such a right, and about a year later, in June of 1953, work on the actual diversion commenced. Seven years thereafter, the plaintiff, a riparian owner of a parcel of land on the Neversink, brought this action to enjoin the city from diverting the river upstream from her property. It was her position, as reflected in her complaint, that it was not until 1959 that she learned that the city "had acquired any portion of her property" and that she had a right to file a claim; that the diversion damaged her property and, if the diversion continued, would occasion further damage; that she had no notice of the city's proceeding; that the notice provisions of the Water Supply Act are constitutionally inadequate; and that, consequently, the

city acquired no right to divert water from the river and should be restrained from so doing.

The city, after serving an answer, moved for judgment on the pleadings (Rules Civ. Prac., rule 112), on the ground (among others) that the plaintiff's action was barred by her failure to file a claim, as required by the Water Supply Act (Administrative Code, § K41-8.0), within three years [fol. 78] from the time title vested in the city or within three years from the time of the actual diversion, whichever happened to be later. The court at Special Term, deciding the motion in favor of the city, dismissed the complaint and the Appellate Division unanimously affirmed the resulting judgment. As already indicated, the plaintiff appeals to this court as of right.

Due process does not, of course, require or insist upon personal service in every type of case. Constitutional demands are satisfied if the notice provided for (and given) is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314; see, also, *Walker* v. *Hutchinson City*, 352 U. S. 112, 115.) And, in determining whether the statutory notice provided for is just and reasonable, "reference" must necessarily be had "to the subject with which the statute deals." (*American Land Co.* v. *Zeiss*, 219 U. S. 47, 67.)

With controlling principles in mind, we believe that the notice provided for by the Water Supply Act satisfies the demands of due process of law. Not only does that statute (the predecessor of which was enacted in 1905) call for frequent publication in "public newspapers"—once a week for six weeks in two newspapers published in New York City and in two papers published in each county in which the real estate affected is located—but it also provides for the posting of handbills, likewise for a period of six weeks, "in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected" (§ K41-8.0).

These requirements were fully complied with—notice of the proposed diversion of the Neversink River was published in appropriate newspapers and, as noted by the Ap-

pellate Division, "handbills were posted in at least 20 conspicuous places in the vicinity of the real estate affected".[1] Moreover, since we deal with real property (cf. *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 316, *supra*), it is of considerable significance that the effect of the challenged diversion was clearly apparent long before the expiration of the three-year period within which the plaintiff was required to file her claim. In sum, as Justice REYNOLDS, speaking for a unanimous Appellate Division, observed, "the publications, posting and the patently visible effect of the diversion proceedings on the Neversink over a three-year [fol. 79] period would constitute sufficient notice to meet • • • [constitutional] requirements".[2]

In the light of what we have written, it is hardly necessary to say that the present case, concerned as it is with notice respecting the tangible and the visible, is quite unlike the *Mullane* case (339 U. S. 306, *supra*).

The judgment appealed from should be affirmed, with costs.

DYE, J. (dissenting). The basic issue on this appeal is whether technical compliance with the notice provisions of the New York City Water Supply Act is constitutionally adequate to satisfy the requirements of due process for the taking of property or an interest therein. We think not

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[1] As to the plaint that the handbills were posted in the month of January and might not be readable in July when a Summer resident such as the plaintiff returned to the area, we need but note that these handbills were printed with permanent ink on durable cloth, about 28 inches long and 18 inches wide, and were firmly affixed to the trees and poles to which they were attached and that they undoubtedly remain legible for years. And, with respect to the notice in the newspapers, we would but add that no newspaper is published in the particular community in which the plaintiff's property is situated.

[2] The fact that a considerable number of property owners failed to present damage claims within the time specified by the statute is beside the point. What the situation may have been in these cases, we are not told and we do not know. It may well be that the omission to file indicated, not that the owners were unaware of the diversion, but that they did not believe that their properties were sufficiently affected to justify the presentation of claims.

and feel obliged to express our dissent from the decision about to be rendered.

The appellant is the owner in fee of premises designated on the appropriation map for the Delaware project as parcel No. 424, Neversink riparian section No. 4 in Deerpark, Orange County, which is about 25 miles downstream from the site of the Neversink Dam and Reservoir in Sullivan County. It is alleged that as a result of such public work her property was adversely affected and seriously damaged. Her claim for compensatory damage, like that of many others, filed more than three years after the vesting, has been rejected for untimeliness (Administrative Code, § K41-18.0).

The New York City Water Supply Act (Administrative Code of City of New York, ch. 41, tit. K), prescribes the procedures to be followed by the Board of Water Supply in acquiring real estate, easements and rights affecting real property required for its water supply system. Section K41-8.0 relates to the manner in which notice shall be given for the appointment of commissioners of appraisal for the purpose authorized.

In pertinent part that section provides: "The corporation counsel shall give notice in the City Record, and in two public newspapers published in the city of New York and in two public newspapers published in each other county in which any real estate laid out on such map may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to such court for the appointment of commissioners of appraisal * * * Such notice shall be so published, once in each week, in each of such newspapers, for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected."

[fol. 80] When the city undertook the construction of the "Delaware Project" for the use of its water supply system it, technically, complied with all prescribed procedures including the publication and posting of notice of the application for the appointment of commissioners of appraisal.

The publication in Orange County was made in newspapers situate in the rural communities of Chester and Warwick located many miles from the subject property and with no circulation in the community where the premises were located although at the time there were available newspapers in the nearby communities of Port Jervis and Middletown. We note too that 22 handbills were posted on trees along highway Route 209 and on trees along the easterly and westerly banks of the Neversink River for a distance of about 100 feet on either side of certain bridge crossings. The posting and publication were done in the month of January and, although in compliance with the letter of the statute, such publication and posting in such remote places at a time when it was known that the subject premises would be vacant, it seems to me, fail to comply with its spirit and intent and as matter of fact failed to give this plaintiff and numerous others, similarly situated, any reasonable opportunity of knowing that such a proceeding was pending.

It is also significant that of the 422 numbered parcels affected or taken and designated on the appropriation map, the fee owners of 224 of such parcels—something more than half—failed to file in time and these figures include only those riparian parcels and exclude those which have appurtenant easements for use of the river, as admitted by defendant's answer. Of that number, the great majority are owners of property located in a section remote from the actual dam project. We cannot believe that all of these owners, if apprised of the intended condemnation, would for their own reasons fail to act to protect their interests.

In our view, the statute relied on is inherently defective since no provision is made for personal service, or any adequate substitute. It is, of course, recognized that personal notice may not always be possible, but that affords no reason why a statute should omit reasonable requirements and depend only on publication and posting of the kind provided by this statute. This statute falls short of the constitutional principles dealt with in *Mullane* v. *Central Hanover Trust Co.* (339 U. S. 306, revg. 299 N. Y. 697, which had affd. 274 App. Div. 772 in which VAN VOORHIS,

J., dissented in an opinion). The principles there enunciated should be followed here. *Mullane* was an accounting proceeding under the common trust fund as established by section 100-c of the New York Banking Law. The notice provisions were challenged as contravening constitutional due process for lack of provision for adequate notice. The notice there provided was a constructive one by publication. [fol. 81] As Justice VAN VOORHIS pointed out in his dissent, which reasoning was adopted with approval by Justice JACKSON writing for a majority in the Supreme Court of the United States, "The fundamental requisite of due process of law is the opportunity to be heard." (*Grannis* v. *Ordean*, 234 U. S. 385, 394.) As Justice JACKSON expressed it: "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest * * * is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 U. S. 457; * * * *Priest* v. *Las Vegas*, 232 U. S. 604; *Roller* v. *Holly*, 176 U. S. 398. * * *. The reasonableness, and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected". (339 U. S., pp. 314-315.)

The statute now before us does not satisfy these elemental tests since it makes no provision for the giving of personal notice of a pending application for the appointment of commissioners, but relies solely on a defective constructive form of notice. The essential thing is notice. It is only when such notice cannot be given personally that resort should be had to a substitute or alternative method such as publication and posting, and then it must be done in a manner calculated to afford actual notice. Here personal service is not required, and no personal service was made although such a requirement could have been easily met since the city knew that the plaintiff owned the subject property—it had available her address and no reason appears why such a notice could not have been given. If constructive service were to be authorized, it could have

been provided in some form which was not calculated to go unobserved by the persons to be affected.

It cannot be disputed that due process "requires that an owner whose property is taken for public use must be given a hearing in determining just compensation" and "The right to a hearing is meaningless without notice." (*Walker* v. *Hutchinson City*, 352 U.S. 112, 115.)

Furthermore, it is apparent from the opinion written in the court below that their holding of constitutional validity was not free from doubt because they added, as an additional ground for affirmance, that "In our opinion the publications, posting and the *patently visible effect of the diversion proceedings on the Niagara sink over a three-year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions.*" (Italics supplied.) However that may be as a comment, it affords no substitute for the fundamentals of due process, that is, a notice reasonably calculated under all the circumstances to apprise a party of the pendency of the action and afford an opportunity to be heard.

[fol. 82] The plaintiff's complaint alleges a cause of action to restrain the diversion on constitutional grounds. The passage of time prevents the granting of that relief but does not prevent a determination of the constitutional question and thus afford this plaintiff an opportunity to have her claim filed and to be heard on the issue of damages for the appropriation. Such a result gives the plaintiff her day in court which so far has been denied—not because she defaulted or acquiesced—but because she never had notice of the pendency of the proceeding sufficiently adequate to satisfy constitutional due process for the taking of her property.

The judgment appealed from should be reversed, with costs in all courts, and plaintiff's cross motion for judgment on the pleadings granted.

Chief Judge DESMOND and Judges FROESSEL and BURKE concur with Judge FULD; Judge DYE dissents in an opinion in which Judge VAN VOORHIS concurs; Judge FOSTER taking no part.

Judgment affirmed.

[fol. 82a] Judge's and reporter's certificate to foregoing paper (omitted in printing).

[fol. 83]

No. 361

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 25th day of January, in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

[fol. 84]

Madeline C. Schroeder, Appellant,

vs.

The City of New York, Respondent.

Remittitur—January 25, 1962

Be It Remembered, That on the 27th day of October in the year of our Lord one thousand nine hundred and sixty-one, Madeline C. Schroeder, the appellant in this cause, came here unto the Court of Appeals, by Kreiger & Scheinman, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Louis B. Scheinman of counsel for the appellant—, and by Mr. Theodore R. Lee, of counsel

for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein [fol. 85] be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

[fol. 86]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

MADELINE C. SCHROEDER, Plaintiff,

—against—

THE CITY OF NEW YORK, Defendant.

JUDGMENT OF AFFIRMANCE—February 9, 1962

MADELINE C. SCHROEDER, the above named plaintiff, having appealed to the Court of Appeals from a judgment of the Appellate Division of this Court, Third Department, entered in this action in the office of the Clerk of

the County of Sullivan on the 11th day of August, 1961, affirming the judgment entered thereon on the 8th day of June, 1960, in the office of the Clerk of the County of Sullivan, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed with costs and a remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of Sullivan, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court and directing the entry of a judgment of affirmance herein with costs of said appeal to be taxed against Madeline C. Schroeder, the plaintiff herein; and the costs of the defendant having been taxed at $338.63;

Now, on motion of Leo A. Larkin, Corporation Counsel of the City of New York and attorney for defendant, it is

Adjudged that the judgment in this action entered on the 11th day of August, 1961, be, and the same hereby is, [fol. 87] affirmed, and that the defendant, The City of New York, recover of the plaintiff Madeline C. Schroeder, the sum of Three Hundred Thirty-eight and 63/100 ($338.63) Dollars, costs as taxed, and for execution therefor.

Judgment entered this 9th day of February, 1962.

Millicent C. Flynn, Clerk.

[fol. 88]

At a Special Term of the Supreme Court held in and for the County of Sullivan at the Sullivan County Court House in the Village of Monticello, New York, on the 9th day of February, 1962.

Present:

Hon. Lawrence H. Cooke, Justice.

MADELINE C. SCHROEDER, Plaintiff,

—against—

THE CITY OF NEW YORK, Defendant.

ORDER ON REMITTITUR—February 9, 1962

The above mentioned Madeline C. Schroeder, having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, Third Department, entered on the 11th day of August, 1961 in the office of the Clerk of the County of Sullivan, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed, with costs;

Now, upon reading and filing the remittitur of the Court of Appeals herein, dated January 25, 1962, it is on motion of Leo A. Larkin, Corporation Counsel of the City of New York and attorney for the defendant,

Ordered, that said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this Court and that the judgment entered herein in the office of the Clerk of the County of Sullivan on August 11, 1961, be, and [fol. 89] the same hereby is affirmed, and that a Judgment of this Court be entered herein affirming said judgment with the costs of said appeal to be taxed against Madeline C. Schroeder, the plaintiff herein.

Enter in Sullivan County

Lawrence H. Cooke, Justice of the Supreme Court.

[fol. 90]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF SULLIVAN

MADELINE C. SCHROEDER, Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK, Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 13, 1962

I. Notice is hereby given that Madeline C. Schroeder, the plaintiff-appellant above named, hereby appeals to the Supreme Court of the United States from the Final Order of Remittitur of the Court of Appeals of the State of New York, dated January 25, 1962, affirming the order and judgment of the Appellate Division of the Supreme Court in the action entitled: "Madeline C. Schroeder, Plaintiff, v. The City of New York, Defendant;" this appeal also being taken from the Judgment of Affirmance dated February 9, 1962, and the Order of the Supreme Court dated February 9, 1962, making the judgment of the Court of Appeals the judgment of the Supreme Court of the State of New York, all of said orders having been entered in the Sullivan County Clerk's Office on February 9, 1962.

This appeal is taken pursuant to 28 U.S.C. §1257, subd. 2.

II. The Sullivan County Clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States. Said transcript shall include all of the papers forming the record on appeal in the Court of Appeals of the State of New York, together with the following papers:

[fol. 91] Order of Remittitur of the Court of Appeals.

Order of the Supreme Court entered February 9, 1962.

Judgment of affirmance entered February 9, 1962.

III. The following question is presented by this appeal:

Is Title K41-8.0 of the Administrative Code of the City of New York, also known as Chapter 724, Sec. 8, of the Laws of 1905 of the State of New York, as last amended by Chapter 357, Sec. 4 of the Laws of 1939 of the State of New York, unconstitutional on its face and as applied in this case in that it provides in a condemnation proceeding for notice which is entirely constructive and also fails to provide even minimum standards for such notice, thereby taking from plaintiff her real property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

Louis B. Scheinman, Attorney for Appellant, Office and Post Office Address, Woodbourne, New York.

To:

Millicent C. Flynn, Sullivan County Clerk, Monticello, New York.

Leo A. Larkin, Esq., Corporation Counsel of the City of New York—Appellee, 41 John Street, Kingston, New York.

John F. Davis, Esq., Clerk of the Supreme Court of the United States, Washington 25, D. C.

[fol. 92] Affidavit of service (omitted in printing).

[fol. 93]

SUPREME COURT OF THE UNITED STATES

No. 763—October Term, 1961

MADELINE C. SCHROEDER, Appellant.

vs.

CITY OF NEW YORK.

ORDER NOTING PROBABLE JURISDICTION—April 30, 1962

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

Mr. Justice Frankfurter took no part in the consideration or decision of this case.